IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GEORGE MANTAKOUNIS t/a MANTIS PAINTING COMPANY	:	CIVIL ACTION
v.	:	
AETNA CASUALTY& SURETY COMPANY d/b/a TRAVELERS- AETNA PROPERTY & CASUALTY CORPORATION	:	98-4392

MEMORANDUM & ORDER

J. M. KELLY, J. **DECEMBER , 1999**

Presently before the Court is Defendant Aetna Casualty & Surety Company's ("Aetna") Motion for Judgment as a Matter of Law pursuant to Federal Rule of Civil Procedure 50(a), or alternatively Motion to Amend Judgment pursuant to Federal Rule of Civil Procedure 59(e). These motions arise from a trial in this matter held in this Court which resulted in a jury verdict in favor of the Plaintiff, George Mantakounis ("Mantakounis") for breach of contract and in favor of Aetna for wrongful use of civil process. For the following reasons, the Defendant's Motion for Judgment as a Matter of Law is granted.

I. BACKGROUND

This case arose out of a dispute between Mantakounis and his insurance company, Aetna, over claims made on the Plaintiff's commercial general liability policy insuring his spray painting business. In June of 1989, Mantakounis was informed of an overspray which occurred while he was painting outdoors in Delaware City, Delaware, allegedly damaging cars parked in a nearby lot. Mantakounis reported the overspray to Aetna, who assigned a claims representative to investigate the incident. Ultimately, 433 claims were filed with Aetna against Mantakounis'

policy for damage caused by the overspray. A dispute arose over the deductible owed by Mantakounis and after he refused to pay, Aetna filed suit in Delaware Superior Court. After a nonjury trial, the Delaware court held in favor of Mantakounis, finding that Aetna had not sustained its burden of proving he was responsible for the deductible on each of the 433 claims Aetna paid. On August 20, 1998, two years after the resolution of the Delaware case, Mantakounis filed this suit.

This case was originally filed as an action for breach of contract, breach of fiduciary duty, bad faith pursuant to 42 Pa. Cons. Stat. Ann. § 8371 (1991), violations of the Unfair Trade Practices and Consumer Protection Law, 73 Pa. Cons. Stat. Ann. § 201.2, and wrongful use of civil process in violation of the Dragonetti Act, 42 Pa. Cons. Stat. Ann. § 8351. Aetna filed a Motion for Summary Judgment on all counts which, in a Memorandum and Order dated August 10, 1999, this Court granted in part and denied in part. The motion was granted as to Mantakounis' claims for breach of fiduciary duty, bad faith and violations of the Consumer Protection Law. Mantakounis' breach of contract and Dragonetti Act claims were tried before a jury in this Court. At the close of Mantakounis' case, Aetna moved for Judgment as a Matter of Law pursuant to Rule 50(a) on the breach of contract claim, asserting it was barred by the applicable statute of limitations. The Court took the matter under advisement and allowed the Defendant's case to proceed. At the close of trial, Aetna renewed its motion for judgment as a matter of law. The Court reserved its decision until after trial and submitted the case to the jury subject to the parties' written argument on Aetna's motion. The jury returned a verdict in Mantakounis' favor on the breach of contract claim for $50,000, and in Aetna's favor on the Dragonetti Act claim.

II. DISCUSSION

Aetna argued in its motion for summary judgment that Mantakounis' breach of contract claim was time-barred. The Court denied Aetna's motion on that argument, however, because it found there was a genuine issue of material fact as to when Mantakounis knew or should have known whether Aetna failed to properly investigate the claims. Specifically, the issue to be determined at trial was "whether Mantakounis knew or should have known on or before August 20, 1994 [four years prior to filing the Complaint in this case], whether Aetna failed to properly investigate the cause of any property damage or the legitimacy of claims made against his policy." Mantakounis v. Aetna Cas. & Sur. Corp., No. CIV. A. 98-4392, 1999 WL 600535, at *6 (E.D. Pa. Aug. 10, 1999). Aetna argues in the instant motion that under this standard and based on Mantakounis' uncontroverted testimony at trial, it is entitled to judgment as a matter of law because this claim is time-barred.

Under Rule 50(a), a court may grant judgment as a matter of law "only if 'a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for the party on that issue.'" Fed. R. Civ. P. 50(a); see Mosley v. Wilson, 102 F.3d 85, 89 (3d Cir. 1996). In granting a motion for judgment as a matter of law following a jury verdict, the court must view the evidence in the light most favorable to the nonmoving party and determine whether the record contains the "minimum quantum of evidence from which a jury might reasonably afford relief." Mosley, 102 F.3d at 89 (citing Parkway Garage, Inc. v. City of Philadelphia, 5 F.3d 685, 691 (3d Cir. 1993)).

On direct and cross examination, Mr. Mantakounis testified regarding the events surrounding the alleged overspray and Aetna's investigation. On numerous occasions, all of

which were uncontroverted, Mantakounis testified to his knowledge of problems in the investigation by Aetna and that he was aware of such problems at least as early as 1992.

First, Mantakounis testified that other painting companies were painting in the area, but that Aetna's claims investigator, Eileen Tolan, did not pursue this. Specifically, he testified:

> Q: When do you recall people painting in the Star parking lot?
>
> A: There were numerous complaints coming in and I couldn't imagine how it was possible that all these cars were getting paint on them and most of them from the Star parking lot.
>
> It took only a few minutes to drive over there and look around and while I was there, I looked at [sic] saw about the fourth or fifth level up of this structure men painting openly with spray guns the structural steel of the girders. That was on one occasion.
>
> I went back, called Ms. Tolan and told her what I had seen and she says, "I will check into it."
>
> . . .
>
> Q: Did Ponds & Thomas do any work in the Delaware City area?
>
> A: Yes.
>
> Q: Did you ever advise Ms. Tolan they did work in that area?
>
> A: Yes.
>
> Q: Did you ever go to Delmarva Power & Light?
>
> A: Yes.
>
> Q: Tell us what you did at Delmarva Power & Light.
>
> A: The first time I called Ms. Tolan, she said she checked up on it and I called her a second time – I went back to the parking lot of Star a second time, the second day and even the third day and I saw them now, the same contractors hanging tarpaulins on the structural steel that they were painting on another level. That was to reduce the amount of over spray being blown away from the structure. This is my own observation.

I called her and told her about it and she said to me on the phone, "I don't have time to do all this." Something to that effect.

I said, "Well, you know you are my insurance company and I think you should be protecting me and one of the things you should do is check and see who is painting there and why."

She said, "I did and there is nobody painting in the Star Refinery."

Star has in the summertime, 20 to 30 painters painting and that's plus other subcontractors who come in and do painting for them on a subcontract basis.

Tr. at 11-14. On cross-examination, Mantakounis further elaborated on the other painters performing work in the area. He stated:

Q: Now, let's talk about, is it Ponds & Thomas?

A: Yes.

Q: You drew a diagram, could you mark for us on the diagram where you saw people painting the tour [sic] [tower] at the Star lot?

A: I would be glad to.

Q: How far was that?

A: Five, six hundred feet.

Q: Was it clearly visible from the parking lot?

A: Yes, it was three hundred feet.

Q: You could see that three hundred foot distance?

A: Yes, you could see the puff of paint as he sprayed the steel.

Q: Is it your testimony that you stood there and watched him yourself?

A: Correct and went back and got my son and he looked at it and said we should take pictures.

Tr. at 34-35. Further, following testimony that he had measured the distance from the tanks that he was painting to the damaged cars, Mantakounis testified that by June 9 or June 10, 1989, he had determined that his company could not have been responsible for the alleged overspray:

> Q: And based only on your experience in the painting industry and based upon the distance that you measured on that day, whether it was June 9 or June 10, you concluded in your own mind, didn't you, that your company could not have caused the over spray at the Star Refinery because of the distance involved, correct?
>
> A: Because of the distance and because of the height which we were working at.
>
> Q: That was a determination you made in your own mind by when, sir, June 10?
>
> A: I can't give you the date exactly. I don't know.
>
> Q: It would have been at about the same time you measured the distance, right?
>
> A: About.

Tr. at 27.

Additionally, on direct examination, Mantakounis described his own efforts at investigating the alleged overspray. When asked whether he checked if another business in the area was having any painting done, Mantakounis testified:

> A: Following the incident with Star and noticing Ms. Tolan was not going about investigating the way I would have investigated, I started with checking with Delmarva . . . .

Tr. at 14.

Finally, Mantakounis acknowledged on cross-examination that by July 16, 1992, he was aware of the shortcomings in Aetna's investigation. Reading from Mantakounis' Complaint in

the instant case, the parties stated:

Q: Let me read Paragraph 20.

> "The above named plaintiff alleges and avers depositions in the superior court in the State of Delaware case were taken of the defendant George Mantakounis on April 18, 1992. The depositions of Eileen Tolan were taken on May 5, 1992 and July 16, 1992. The plaintiff alleges and avers no later than July 16, 1992 the defendant had notice as to the investigation and what had occurred in this matter."
>
> Did I read that correctly?

A: Yes.

Q: So, is it fair to say, sir, if Etna [sic] had notice of what you perceived as shortcomings in Ms. Tolan's investigation, you also knew about them, as well; is that correct?

A: Possibly.

Q: You say, "possibly", is that yes, seeing as how you made the allegation in the complaint?

A: Yes.

Tr. at 21-22.

As stated previously, the issue as defined by this Court on Aetna's motion for summary judgment is when Mantakounis knew or should have known whether Aetna failed to properly investigate the cause of any property damage or the legitimacy of any claims made against the policy. By his own uncontroverted testimony, Mantakounis recognized that Ms. Tolan was not conducting the investigation the way he would have, so in 1989, he took it upon himself to do so. Further, he acknowledged that he knew about perceived shortcomings in the investigation as of July 16, 1992, the date of Ms. Tolan's second deposition.

The Plaintiff argues the testimony is disputed, relying on the statements of the

Defendant's witnesses that the investigation was adequate. Specifically, Mantakounis points out that one of Aetna's witnesses, Wanda Wagner, testified that she believed there were some shortcomings in the investigation, but that it was still appropriate. Aetna's other witness, Jane Waszk, testified that she thought this was a thorough investigation and she did not believe there were any shortcomings. Mantakounis argues that in order to find that he had notice of the potential breach of contract based on his statements that there were problems with the investigation, the Court must also find that Aetna's witnesses' testimony leads to the same conclusion.

At issue, however, is not the adequacy of the investigation by Aetna, but when Mr. Mantakounis knew or should have known there was a problem with the investigation. As the Plaintiff correctly points out, the key to the discovery rule is not the actual acquisition of knowledge, but whether the information, through exercise of due diligence, was knowable to the plaintiff. See Cappelli v. York Operating Co., 711 A.2d 481, 488 (Pa. Super. Ct. 1998). A failure to inquire into available information is, as a matter of law, a failure to exercise due diligence. See id. Yet, the Plaintiff still argues that just because he believed there were shortcomings does not lead to the conclusion that he had knowledge that any of those shortcomings were significant enough for him to conclude the contract had been breached. The Plaintiff's argument is flawed in that it assumes the discovery rule requires a party to be aware that he has a cause of action before the statute of limitations will begin to run. Under the discovery rule, however, a party need only have notice that he has been injured and that his injury has been caused by another party's conduct. See Urland v. Merrell-Dow Pharm., 822 F.2d 1268, 1271 (3d Cir. 1987). Therefore, this Court finds that, by his own testimony, Mantakounis knew

that he had been injured by Aetna as early as July 1992, or at least that through the exercise of diligence, such was knowable to him.

Accordingly, the Court finds that Mantakounis knew or should have known on or before August 20, 1994, four years prior to filing suit in the instant case, whether Aetna failed to properly investigate the alleged overspray. Under the discovery rule, the statute of limitations bars Mantakounis from relief for breach of contract and Aetna's motion is granted. Aetna's motion to amend judgment is therefore dismissed as moot. Judgment will be entered in favor of the Defendant.

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O R D E R

AND NOW, this day of December, 1999, in consideration of the Motion for Judgment as a Matter of Law or alternatively Motion to Amend Judgment by Defendant Aetna Casualty and Surety Company (Doc. 24) and the response thereto of Plaintiff George Mantakounis, it is ORDERED:

1. The Motion for Judgment as a Matter of Law is GRANTED.

2. The Motion to Amend Judgment is DISMISSED as moot.

3. Judgment is ENTERED in FAVOR of the DEFENDANT, Aetna Casualty and Surety Company, and AGAINST the PLAINTIFF, George Mantakounis.

BY THE COURT:

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JAMES McGIRR KELLY, J.